No. 82-1160

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANATOLY ARUTUNOFF, et al.,

Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals balance the appropriate factors in reviewing whether Oklahoma's ballot access requirements for new political parties operated to effectively exclude from the State's political process those reasonably diligent political parties possessing a significant modicum of popular support?

2. Is there any conflict between the Eighth Circuit and Tenth Circuit Courts of Appeals regarding the appropriate standard of review and analytical methodology to be applied by courts called upon to consider challenges to State ballot access restrictions?

3. Is Oklahoma constitutionally obligated to permit political organizations receiving the support of less than 2 percent of the electorate to retain their status as officially recognized political parties or obligated to permit initial ballot access to such organizations without first requiring submission of a petition containing not less than 5 percent of the votes cast for the highest statewide office on the ballot at the last preceding general election?

4. Does the Fourteenth Amendment to the United States Constitution prevent Oklahoma from imposing different ballot access petition requirements on single independent candidates than are imposed upon

organizations seeking political party recognition and the right to field an entire slate of candidates?

5. Is Oklahoma obligated, under the First Amendment to the United States Constitution to permit its citizens to use voter registration forms (which forms serve only to declare in which recognized party primary the registrant chooses to participate) for the expression of personal political sentiment.

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OCTOBER TERM, 1982

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BEVERLY CHANSOLME, BOB MILLER,
TOM LAURENT, PAUL WOODARD, JIM SESSIONS,
THOMAS G. WINTER, DAN PHILLIPS,
LYNN CRUSSEL, AND GORDON MOBLEY,

Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD,
GRACE HUDLIN, CHAIRMAN OF THE
OKLAHOMA STATE ELECTION BOARD;
DREW NEVILLE, VICE CHAIRMAN OF
THE OKLAHOMA STATE ELECTION BOARD;
AND LEE SLATER, SECRETARY OF THE
OKLAHOMA STATE ELECTION BOARD,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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The Respondents, the Oklahoma State Election Board and its constitutent members who were parties to the proceedings below, by and through their counsel, Michael C. Turpen, Oklahoma State Attorney General, by James B. Franks, Assistant Attorney General, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at Arutunoff v. Oklahoma State Election Board, 687 F.2d 1375 (10th Cir. 1982).

COMBINED STATEMENT OF CASE AND STATEMENT OF FACTS

The first appearance of the candidates of the Libertarian Party on an Oklahoma election ballot was in the primary and general elections held in 1980. This followed a successful petition drive in which that organization was able to garner the signatures of not less than 5 percent of the number of persons who had voted for the Office of Governor in 1978. The petitioning process employed in this phase of Oklahoma's ballot access system is quite free and open. A voter may sign such petitions even though he may have also signed others, and voters who have signed such petitions remain free thereafter to participate in the primaries of other recognized parties. Petition signers are not

required to state that they intend to vote for the candidate or party circulating any ballot access petition, and persons who have previously voted in another party's primary or who were not even registered to vote at the time of the previous election are nonetheless entitled to participate in such ballot access petition drives.

In the general election itself, the Libertarian Party demonstrated a near total absence of any reasonable modicum of popular support for their candidates; their most successful statewide votegetter received a mere 1.2 percent of the votes cast. However, retention of the political party recognition earned by means of the petition drive is expressly conditioned upon the achievement by the party of at least 10 percent of the votes cast, and the Libertarian Party has now been decertified as a recognized political party in Oklahoma.

In response to the decertification mandated by Oklahoma ballot access regulations, the Libertarian Party has mounted a three-prong attack on those election laws in the federal courts. The first line of attack is focused upon the percentage of votes required for retention and upon the petition signature requirement for initial access or recertification. It is asserted that under the laws existing prior to 1975, the year Oklahoma election law was comprehensively recodified, the amount of support required for access and retention

provided a more permissive access system than under the present law. Second, the Libertarians complain that independent presidential candidates are able to place their electors on the ballot by means of a 3 percent voter petition or, in the alternative, by paying a filing fee. On the other hand, political party recognition (carrying with it the right to field a slate of presidential electors) requires submission of the 5 percent petition described above. Last, the Libertarians argue that even if they have been properly decertified, subject only to recertification by means of a new petition drive, they must nonetheless be permitted to declare their Libertarian affiliation on their voter registration forms, despite the fact that a nonrecognized political orgnaization may not conduct primary elections.

Throughout the litigation in the district and circuit court, and again in their Petition for Writ of Certiorari, the Libertarians have urged the adoption of a kind of "litmus-paper" test for the validity of Oklahoma's various ballot access mechanisms. Their reasoning seems to be that if Oklahoma permitted what they assert was a less restrictive ballot access system prior to 1975, then how can the regulations imposed in 1975, which they argue are more restrictive, constitute the least restrictive means of satisfying the State's conced-

edly valid and compelling interests which are always present in cases such as these?

However, both the district court and the circuit court have declined to rise to this bait. Instead, these courts have quite properly considered the practical effects of the presently extant ballot access regulations, viewed in their totality, with an eye toward determining whether the particular provisions under attack, when considered in connection with other related election laws, unduly encourage maintenance of the political status quo or are oppressive to a degree that stifles the exercise of First Amendment rights. See, Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), at 1379-1380. The Libertarians have been denied the relief they seek because these lower courts were convinced that, on balance, Oklahoma's ballot access provisions permit reasonably diligent political parties possessed of a reasonable modicum of popular support to attain and hold their place on the State's election ballots.

The Libertarians' other bases of challenge to the State's election laws are so exotic and unfounded that they appear to be makeweights. There is hardly any basis for insisting that access requirements for independent candidates and party candidates must be identical. The two situations have been consistently recognized as being vastly different. See, e.g., Socialist Workers

Party v. Davoren, 378 F. Supp. 1245 (D.Mass. 1974) (3 judge panel).

Nor is there any readily apparent reason why Oklahoma must permit anyone to use government promulgated voter registration forms for the expression of political sentiment. The purpose of the party affiliation provision on such forms is to permit election officials to know whether a voter is entitled to vote in a party primary. Only recognized parties have such primaries. This highly specialized government form is hardly an appropriate forum for free speech.

Notwithstanding the contrary assertions of the Libertarians, all of these issues were fully considered and properly disposed of by the courts below. All that remains is the question of whether this is a case which properly merits further review by the United States Supreme Court. For the reasons set forth below, it does not.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The predominate question offered for review by the Petitioners presents no justiciable case or controversy within this Court's jurisdiction under the U. S. Const., Art. III, § 2, cl. 1.

The heart of the Petitioner's lawsuit in the courts below, as well as the central focus of their Petition for Writ of Certiorari, is their claim of constitutional injury arising under the provisions of Oklahoma law governing ballot access and recognition retention for new political parties. They also present an equal protection claim based upon disparities between treatment afforded such parties, on the one hand, and independent presidential electors, on the other, as well as a claim they are denied rights of free expression because Oklahoma will not permit them to declare their Libertarian status on their voter registration forms in the absence of official recognition of their organization as a qualified political party. These latter claims, however, are plainly ancillary to the primary thrust of the Libertarian arguments and, in any event, do not present constitutional questions of any real substance.

The jurisdictional problem with the Libertarians' primary claim is that the circumstances of this case render it impossible for this Court to afford them the relief they seek via a decree of conclusive character resulting in a final resolution of this dispute. It is not subject to dispute that the U. S. Const., Art. III, § 2, cl. 1, provides a substantive limitation upon the fundamental power of the federal judiciary, including the United States Supreme Court. In the case of Preiser v.

Newkirk, 422 U.S. 395, 45 L.Ed.2d 272, 95 S.Ct. 2330 (1975), this Court observed that:

> "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971), a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Id. 422 U.S. at 401. (Emphasis added)

This test for the jurisdiction of this Court obligates us to examine the potential effect upon the rights of the Libertarians should they receive the declaratory and injunctive relief they seek. Such inquiry demonstrates that even in such event, the Libertarian organization will not regain its previously held status as a recognized political party. Thus, the decree they ask this Court to grant cannot resolve their problem and will not be conclusive in character.

The reason for this is relatively straightforward. Under Oklahoma law, a court decision holding a statutory provision to be unconstitutional has the effect of reactivating a prior statute which the invalid act has displaced. Ex parte Masters, 258 P. 861, 863 (Okl. 1927); State ex rel. Burns v. Steely, 600 P.2d 367, 368 (Okl.Cr. 1979); C.S.M., Jr. v. State, 599 P.2d 426, 429 (Okl.Cr. 1979). It follows, then, that a decree of this Court granting to the Libertarians the relief they here seek would have the effect of reactivating the provisions of 26 O.S.1971, § 111 and 26 O.S.1971, § 299, which, respectively, govern retention of official recognition by political parties and the attainment of such recognition by new parties.

The Libertarian arguments make much of the fact that the provisions of § 111, supra, condition political party decertification upon failure to attain 10 percent of the vote at two preceding elections, and this is true as far as it goes. The Libertarians lost their certification for their failure to attain as much as 2 percent of the vote at a single election, as required by present law, 26 O.S.Supp.1974, § 1-109. All these statutes have been attached to the Libertarians' Petition as an appendix.

What the Libertarians either overlook or hope to conceal, however, is that their poor showing in the 1980 general elections would have resulted in their loss of

official party recognition, even under the prior law found at § 111. Under that statute:

> "A political party is an affiliation of electors representing any political organization which, at the next general election preceding, polled for President or Governor at least five per centum of the entire vote cast for either of said respective officers . . . ." 26 O.S.1971, § 111. (Emphasis added)

Obviously, under such law, retention of political party official recognition requires more than the attainment of 10 percent of the vote at either of the two last preceding elections. In addition, such an organization must also receive at least 5 percent of the vote at the last preceding election, and this the Libertarians were unable to do.

The upshot is that regardless of how this Court might ultimately dispose of the petition in this cause, the Libertarians will still only regain official recognition of their status as a political party by mounting a new ballot access petition drive. No decree of this Court could provide specific relief of a conclusive nature. In effect, the Libertarians seek an advisory opinion.

The Respondents anticipate that the Libertarians might respond to these points by asserting that even if they remain decertified, reinstatement of the prior statutes on these subjects would at least permit them to regain their certified status by submission of only five thousand (5,000) signatures on a ballot access petition, as provided under 26 O.S.1971, § 229. Yet, it hardly seems likely that this Court could seriously consider forcing Oklahoma to return to such a minimal standard for initial ballot access. After all, the requirement of petitions showing 5 percent of voters at the last preceding election for initial political party ballot access was expressly approved by this Court in the case of Jenness v. Fortson, 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971), as well as a requirement that status retention depended upon attainment of 20 percent of the vote at the election.

The Respondents are hardly willing to concede the existence of any constitutional infirmity in Oklahoma's presently extant system of ballot access regulation. But, even under previously existing law, which would be reinstated should this Court grant the relief sought by the Libertarians, that organization's status would remain unchanged. It would still be an affiliation of electors representing a political organization, without the right to recognition as a political party, absent a new petition drive to attain such status. It follows that

the primary questions tendered for review by the Libertarians fail to offer a case or controversy within the meaning of Article III of the Constitution, and it is entirely inappropriate for this Court to undertake the review requested.

II. The decision in the case of McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) is in complete harmony with the decision of the Tenth Circuit Court of Appeals in the instant case.

In McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), the Court of Appeals for the Eighth Circuit was called upon to review a decision of a United States District Court which had overruled a challenge by a new North Dakota political party to the ballot access provisions of the election laws of that state. The district court in McLain had reviewed North Dakota's ballot access regulations under the rational basis standard and had concluded that the access requirements were rationally related to the state's legitimate objective of avoiding confusion, deception and frustration of the democratic process. Id. 637 F.2d at 1163.

The Eighth Circuit reversed, finding that the decisions of the United States Supreme Court in the ballot access field require the heightened scrutiny which is necessary where fundamental rights are implicated, and further finding that the access statutes

there reviewed could not withstand such heightened scrutiny.

The Respondents are completely unable to discern any meaningful distinction between the treatment afforded the North Dakota ballot access statute in McLain, and that afforded Oklahoma's ballot access statute by the Tenth Circuit Court of Appeals in the opinion below. It is plain from the decision in this case below that the Tenth Circuit, like the Eighth, closely scrutinized the ballot access statute presented. The opinion below expressly observed that:

> "The issue here presented is whether these Oklahoma ballot access restrictions unduly burden the plaintiffs' first and fourteenth amendment rights to political association and ballot access. After careful examination of the challenged statutes, we have determined that these Oklahoma election laws can withstand close scrutiny, that they advance compelling state interests, and that they accomplish important state goals without unduly burdening the constitutional rights of political parties and their members. We are thus in accord with the trial court's judgment." Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1379 (10th Cir. 1982).

If there exists any difference at all between these two circuit courts of appeals decisions, it is only in the fact that the Eighth Circuit disapproved North Dakota's ballot access system, whereas the Tenth Circuit has upheld Oklahoma's. Yet this circumstance hardly reflects any dispute among the circuit courts regarding ballot access law. Rather, the difference in the results reached merely reflects that the North Dakota system was significantly more restrictive than that provided by Oklahoma law.

In the most recent comprehensive review of ballot access law provided in a decision of this Court, Justice Rhenquist observed that:

> "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.' Bullock v. Carter, 405 U.S. 134, 143, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972). 'In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact upon voters.' Ibid. In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a 'litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection

> Clause.' Storer v. Brown, 415 U.S. 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. Ibid., Williams v. Rhodes, 393 U.S. 23, 30, 21 L.Ed.2d 24, 89 S.Ct. 5, 45 Ohio Ops2d 236 (1968)." Clements v. Fashing, ___ U.S. ___, 73 L.Ed.2d 508, 516, 102 S.Ct. ___ (1982). (Emphasis added)

In light of the relatively fluid standard of heightened scrutiny endorsed by this Court and the balancing of multiple factors which is necessary in order to resolve any challenge to a state ballot access restriction, it becomes apparent that different federal courts will inevitably reach different results when examining the access restrictions imposed by different states.

This is well illustrated by the two circuit courts of appeals decisions presented here. In McLain, there were two aspects of the North Dakota ballot access system which were found by the Eighth Circuit Court of Appeals to be most significant. These were the number of signatures required to be presented in support of the

petition for initial ballot access by new political parties, and the date prior to the election by which such petition had to be filed with state authorities. Id. 637 F.2d at 1164. Under the North Dakota statute there attacked, it was necessary for a new party seeking official recognition to submit fifteen thousand (15,000) signatures by no later than June 1 of the election year. Id. 637 F.2d at 1162.

The new political party in McLain was seeking access to the North Dakota ballot for the 1978 elections. Therefore, the fifteen thousand (15,000) petition signatures required for ballot access in that year represented a bit more than 5 percent of the 297,188 votes cast for presidential electors at the last preceding election, held in 1976. See, 12 AMERICA VOTES 286 (Scannon & McGilliway ed. 1977). Even though the petition signature requirement for 1978 considered by the Court in McLain was slightly more burdensome upon the aspiring new party (when reduced to a percentage figure) than that which operates in Oklahoma, the Eighth Circuit opinion admitted that it was arguably valid under the decisions of the United States Supreme Court, at least if viewed standing alone.

It was, therefore, only when the petition signature requirement in North Dakota was viewed in conjunction with the relatively early filing deadline that the scales

of the balance tipped against the North Dakota ballot access regulation. North Dakota's deadline for the petitions was June 1, more than 90 days before the primary election and more than 150 days before the general election. McLain v. Meier, supra, 637 F.2d at 1164.

In Oklahoma, however, the filing deadline for ballot access petitions is significantly later, on July 1. 26 O.S.Supp.1974, § 1-108. This is less than 60 days before the first primary elections and not more than about 130 days before any general election. The additional time permitted to new political parties to garner the signatures necessary for qualification for recognized party status under Oklahoma law provides a distinction between North Dakota law and Oklahoma law which is far more than merely theoretical. It provides a fairly clear explanation of why the balancing process conducted by each circuit court of appeals produced different outcomes in the two cases.

What remains most clear is that the Eighth and Tenth Circuit Courts of Appeals each applied the same legal standards to the ballot access regulations placed before them. Each court conducted the necessary balancing and each reached conclusions which are sustainable under the differing circumstances. It follows that there exists no split of authority among the circuit

courts which would justify an exercise of jurisdiction by this Court.

III. Ballot access cases, by their very nature, will tend to turn upon a balancing of unique facts and circumstances presented by the particular combination of restrictions embodied in the relevant state statutes. This makes such cases peculiarily inappropriate for review on Petition for Writ of Certiorari, especially where the district court and the circuit court of appeals have conducted the requisite balancing and have reached the same result.

It has been the consistent and sound policy of this Court to decline to grant petitions for writs of certiorari in cases which tend to be resolvable more upon their own peculiar facts than upon an application of principles of law. See, e.g., Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509, 68 L.Ed. 413 (1924); United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925 (1925).

Yet it may be that there is no field of constitutional doctrine where cases are more likely to turn upon their own peculiar facts and circumstances than the field of ballot access law. This was expressly recog-

nized by Justice White's opinion in the case of Storer v. Brown, 415 U.S. 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974), where the Court observed that:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a matter of degree, (citation omitted) very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. (citation omitted) What the result of this process will be in any specific case may be very difficult to predict with great assurance." (Emphasis added)

This much is plain about the experience of the Libertarian Party in Oklahoma, notwithstanding the contrary assertions of the Petitioner: The requisite

balancing of the relevant facts and circumstances, with proper application of the appropriate level of enhanced scrutiny mandated by the decisions of this Court, has been undertaken and performed by both the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit. As this Court observed in the case of Graves Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 93 L.Ed. 672 (1949):

> "A Court of law such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Libertarian organization in Oklahoma has not been denied official political party status because Oklahoma ballot access restrictions are unduly burdensome. Rather, they have been denied such status because of the nearly total absence of popular support for their organization among Oklahoma voters. All of the factors relevant to this situation have been fully analyzed and balanced by both of the lower courts which have considered the matter. Accordingly, there is no proper basis for further consideration of such matters by this Court.

CONCLUSION

One of the Libertarians' most basic assertions in this case is that Oklahoma, having once possessed a system of regulating ballot access which is argued to have adequately served the State's legitimate interests, is constitutionally prohibited from altering its ballot access laws in any way which would arguably be more restrictive. Yet, this is precisely the kind of "litmus-paper" test which this Court has consistently rejected in ballot access cases, and which was properly rejected by the lower courts in this case.

It further appears that this cause presents a situation where, as a practial matter, no decree by this Court could effectively grant dispositive and conclusive relief among the litigants. Regardless of the outcome here, the Libertarians will not regain official recognition of their organization as a political party. This raises a serious question of whether there exists a case or controversy within the jurisdictional bounds of Article III of the Constitution.

It is also plain that no conflict exists among the various circuit courts of appeals which would justify granting review via the Petition for Writ of Certiorari. Just as importantly, this case, like most ballot access cases, turns so peculiarly upon its own facts that review via Petition for Writ of Certiorari is singularly inappropriate.

For all of these reasons, the Respondents pray that this Honorable Court will deny the Petition for Writ of Certiorari by the members of the Libertarian Political organization of Oklahoma.

Respectfully submitted,

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